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Public Health, Environmental Protection, and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure

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PUBLIC HEALTH, ENVIRONMENTAL PROTECTION, AND THE DORMANT COMMERCE CLAUSE:

MAINTAINING STATE SOVEREIGNTY IN THE FEDERALIST STRUCTURE

INTRODUCTION

Acid deposition, commonly known as "acid rain," accounts for "respiratory disease in humans, loss of profits from farming, accelerated building deterioration, and numerous negative impacts" on the natural environment and wildlife.[1] With respect to human health, the particulates that form acid deposition can be "inhaled deep into people's lungs," exacerbating asthma and bronchitis.[2] It has been estimated that, in 2007, approximately 6,000 people will die prematurely because of the same pollution that makes up acid rain.[3] Surprisingly, the estimated fatality rate would be less than it is today.[4]

In the United States, the effects of acid deposition are felt almost exclusively by Northeast states,[5] although the primary sources of sulfur dioxide, the main ingredient of acid deposition, are electric utilities in the Midwest and South.[6] Despite this discrepancy, the United States District Court for the Northern District of New York recently

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[1] DAVID B. FIRESTONE & FRANK C. REED, ENVIRONMENTAL LAW FOR NON-LAWYERS 81 (1993).

[2] United States Environmental Protection Agency, *Effects of Acid Rain: Human Health*, *at* http://www.epa.gov/airmarkets/acidrain/effects/health.html (last updated Nov. 12, 2003).

[3] Eric Pianin & Dan Morgan, *Study Says 8 Utilities' Pollution Causes Premature Deaths*, WASH. POST, Apr. 18, 2002, at A4; Katharine Q. Seelye, *Study Sees 6,000 Deaths from Power Plants*, N.Y. TIMES, Apr. 18, 2002, at A21.

[4] Seelye, *supra* note 3.

[5] GWYNETH HOWELLS, ACID RAIN AND ACID WATERS 114 (2d ed. 1995).

[6] Clean Air Mkts. Group v. Pataki, 194 F. Supp. 2d 147, 151 (N.D.N.Y. 2002), *aff'd on other grounds*, 338 F.3d 82 (2d Cir. 2002) (noting that 67% of sulfur dioxides come from utilities that generate electricity); U.S. GEN. ACCOUNTING OFFICE, ACID RAIN: EMISSIONS TRENDS AND EFFECTS IN THE EASTERN UNITED STATES, *available at* http://www.gao.gov/archive/2000/rc00047.pdf (Mar. 2000) (analyzing sulfur dioxide and nitrogen oxide emissions from electrical utility power plants in the Midwest and their deposition throughout the U.S.).

struck down a New York statute that sought to penalize in-state firms that sold sulfur-dioxide emissions credits to facilities in "Upwind States."[7] In *Clean Air Markets Group v. Pataki*,[8] the court ruled that New York's penalty scheme violated the dormant Commerce Clause because a penalty on 100 percent of the proceeds from a sale to an "upwind" facility effectively banned interstate trade of the credits.[9] The court reached this conclusion despite New York's claim that it had the authority to implement such a regulation in order to promote environmental protection within the state.[10]

Interestingly, while the court struck down the statutory provision, it recognized the legitimacy of New York's interest in protecting its environment.[11] If the court recognized the legitimacy of the state interest, why did it rule that the program violated the Constitution? Without much discussion, the court found that the New York program amounted to "economic protectionism."[12] However, does a program that has the goal of averting fatal health effects pertain solely to economics? Does a state's duty to protect the health and safety of its citizenry, under its police power, provide an adequate justification for interference with interstate commerce? Or did acid deposition's impact on farming, structures, and natural resources also play an implicit role in the court's decision?

When addressing environmental issues under the dormant Commerce Clause, the Supreme Court has correctly invalidated state programs that—at base—manifested protectionist intent. The Framer's underlying goal in federalizing interstate commercial regulation was to prevent such protectionist economic measures by the states.[13] They proposed a Constitution that would place the power to regulate interstate commerce in the hands of Congress.[14] The Constitution expressly grants Congress the power "To regulate Commerce . . . among the several States . . . ."[15] The Supreme Court, however, has gone further and interpreted the Commerce Clause as providing an implicit, or "dormant," limitation on the states' ability to regulate interstate

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[7] *Clean Air Mkts. Group*, 194 F. Supp. 2d at 162-63. The district court struck down the law down under both the Supremacy Clause and the dormant Commerce Clause. *Id.* Because the focus of this Note is on the dormant Commerce Clause, it will not discuss the court's opinion with respect to the Supremacy Clause.

[8] 194 F. Supp. 2d 147 (N.D.N.Y. 2002).

[9] *Id.* at 160-62.

[10] *Id.* at 159.

[11] *Id.* at 160.

[12] *Id.* at 161.

[13] THE FEDERALIST NO. 7 (Alexander Hamilton).

[14] THE FEDERALIST NO. 6 (Alexander Hamilton).

[15] U.S. CONST. art. I, § 8, cl. 3.

commerce.[16] The Court has used the dormant Commerce Clause to strike down state regulations seeking to pursue the goal of environmental protection when those regulations interfered with interstate commerce. For the most part, the Court has gotten it right because the environmental regulations in those cases sought to protect state natural resources at the expense of out-of-state commercial actors. However, the Court should affirmatively recognize that environmental protection can entail more than simply natural resources protection. The other purpose of environmental regulations is the protection of public health.[17] Despite this dual purpose of environmental regulations, however, the Court's language in recent dormant Commerce Clause cases has been interpreted to preclude the validity of any state environmental regulations on the grounds of protectionism.

The purpose of this Note is twofold. First, Part I seeks to distinguish the two underlying goals of environmental regulation in a manner that is relevant to dormant Commerce Clause jurisprudence. Natural resource protection historically has been grounded in economic principles.[18] Since the beginning of the conservation movement, its proponents have advocated the efficient use of natural resources in terms of prosperity. Because natural resource protection rests on economic concerns, however, limited resources can make competing populations susceptible to in-fighting. Indeed, the Supreme Court has recognized that competition over natural resources can result in the same type of balkanization about which the Framers were concerned.[19] Because the prevention of balkanization is the underlying goal of the dormant Commerce Clause, the economic con-

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[16] *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 315-20 (1851) (recognizing that the grant of authority to Congress in Article I of the Constitution implicitly precluded the states from enacting laws on national commercial subjects). Commentators consider *Cooley* to be the first instance in which the Supreme Court established an implicit limitation on states under the Commerce Clause. *See, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 69-71 (1995) (discussing the growth of the dormant Commerce Clause).

[17] *See* State of Ohio Environmental Protection Agency, *Mission Statement*, *at* http://www.epa.state.oh.us (last visited Sept. 9, 2004) (noting that the Ohio EPA's mission is "[t]o protect the environment and public health by ensuring compliance with environmental laws and demonstrating leadership in environmental stewardship").

[18] *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 5 (2003) (discussing the relationship between a growing economy and the earth's carrying capacity); GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION 4 (1910) (advocating conservation of natural resources in terms of national success); Clayton R. Koppes, *Efficiency, Equity, Esthetics: Shifting Themes in American Conservation*, *in* THE ENDS OF THE EARTH: PERSPECTIVES ON MODERN ENVIRONMENTAL HISTORY (Donald Worster ed., 1988) (discussing the origins and evolution of the conservation movement).

[19] *See, e.g.*, West v. Kan. Natural Gas Co., 221 U.S. 229, 255 (1911) ("If one state has [the power to regulate interstate commerce], all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.").

cerns that trigger natural resource protection are relevant to dormant Commerce Clause cases.

Although the Framers sought to prevent balkanization, they did recognize one particular limitation to this goal: a state's sovereign powers. With respect to this constraint, it is vital to recognize that the protection of public health is intimately connected to a state's police power. Those areas of life falling under the police power were within the purview of state regulation prior to ratification of the Constitution, and the police power, to this day, has retained its position.[20] Consequently, the police power has remained a demarcation of state sovereignty. Because the dormant Commerce Clause is fundamentally a question of federalism, state sovereignty plays a vital role in determining the degree of authority the Constitution affords states. Because a state's sovereignty entails the power to protect the health of its citizenry, the logical conclusion is that public health issues have a particularly relevant and *valid* position in dormant Commerce Clause jurisprudence.

Part II presents the second purpose of this Note, which is to show that recent Supreme Court opinions addressing state environmental regulations under the dormant Commerce Clause create a standard that works to invalidate state programs that are devoted to the protection of public health. Starting with *City of Philadelphia v. New Jersey*,[21] the Court has correctly identified the protectionist intent of certain state environmental regulations, notwithstanding the purported health and safety concerns of the respective legislatures. In its resolve to expose the underlying intent of resource protectionism, however, the Court has espoused a standard that has been interpreted to invalidate state environmental laws that pertain significantly to public health. One example was the invalidation of New York's penalty system, mentioned above. The district court in that case followed precedent properly because, under the present "*per se* invalid" test, New York's penalty system was undeniably protectionist in nature. Nevertheless, no alternative systems existed that would have both convinced a court to follow a more lenient standard *and* provided New York an effective means to protect its citizens from the ailments caused by acid deposition. Therefore, given the particular position of public health regulation within our federalist structure, courts should identify the type of environmental regulation at issue. Should the regulation fundamentally pertain to public health, then a court should

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[20] *Cf.* United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) (emphasizing that a "generalized police power" reserved to the states "is deeply ingrained in our constitutional history").

[21] 437 U.S. 617 (1978).

afford the health regulation greater legitimacy within its dormant Commerce Clause analysis. Otherwise, states lose meaningful participation in areas of life directly affecting their citizens.

Finally, Part III discusses the issue of acid deposition and demonstrates that it provides an example of an issue that fundamentally pertains to public health. While acid deposition impacts natural resources, its constituents have specific impacts on human health as well, unlike those environmental hazards previously before the Supreme Court. The district court opinion in *Clean Air Markets Group v. Pataki*,[22] however, demonstrates that the Supreme Court's "*per se* invalid" standard does not adequately highlight the critical state interest in public health. Consequently, while the district court in that case correctly followed precedent, it invalidated a state law that should have been upheld. This is for two reasons. First, the regulation of the pollutants that make up acid deposition rests on a clear public-health rationale. Second, acid deposition in the Northeast is peculiar in that *nondiscriminatory alternatives* do not effectively exist, primarily because acid deposition is a classic example of an environmental externality.

Environmental externalities present a singular problem within the Constitutional context. An environmental externality can be characterized as a problem of costs and benefits: "a state that sends pollution to another state obtains the labor and fiscal benefits of the economic activity that generates the pollution but does not suffer the full costs of the activity."[23] This imbalance in costs and benefits is exacerbated by limitations on a state's ability to reach beyond its borders to regulate out-of-state actors. Simultaneously, the federal Clean Air Act[24] has failed to prevent states from externalizing their pollution. Consequently, because "the prevailing winds blow from west to east," the impacts of interstate air pollution in the eastern portion of the United States are "most serious."[25] Without a reexamination of dormant Commerce Clause jurisprudence that appreciates the difference between resource protection and protection of health and safety, the disparity of environmental externalities will be permitted to continue.

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[22] 194 F. Supp. 2d 147 (N.D.N.Y. 2002).

[23] Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996).

[24] 42 U.S.C. §§ 7401-671 (2000).

[25] Revesz, *supra* note 23, at 2351.

I. THE PURPOSES UNDERLYING ENVIRONMENTAL PROTECTION

A. The Consistent Rationale for Natural Resources Protection: Economics

Among the goals of environmental protection is the protection of natural resources, which has long been recognized as resting on economic principles.[26] Conservation of natural resources arguably became a prominent concern in the nation's collective conscience through the seminal essays of Frederick Jackson Turner.[27] Turner recognized that the 1890s was the first decade in which America no longer had a frontier.[28] While Turner's focus was on the effects that the absence of a frontier had on democracy,[29] others began to recognize the potential impact on the economy.[30] The response was the advocacy for resource regulation. Such regulation was thought to "smooth out fluctuations in the business cycle or to introduce long-range calculations [of resource use], which individual entrepreneurs found hard to do when their competitors were intent on immediate use."[31] Gifford Pinchot, who spearheaded the effort to create a national conservation program under Theodore Roosevelt's presidency, grounded his advocacy in the efficient *use* of natural resources, "not for preservation of natural beauty per se."[32] In his published argument, *The Fight for Conservation*,[33] Pinchot relied exclusively on the economic aspect of conservation:

> When the natural resources of any nation become exhausted, disaster and decay in every department of national life follow as a matter of course. Therefore the conservation of natural resources is the basis, and the only permanent basis, of na-

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[26] *But see*, Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003). Klein presents a very compelling evaluation of the Supreme Court's treatment of environmental regulations under both the affirmative Commerce Clause and the dormant Commerce Clause. However, she relies on a basic assumption that resources are delineated between those that are a "market commodity" and those that are a "natural resource." *Id.* at 12-18. This recognition, however, overlooks the economic essence of natural resources. In fact, the term "resources" itself is defined as the "total means available for economic and political development, such as mineral wealth and labor." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1162 (3d ed. 1993).

[27] *See* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 145-47 (3d ed. 1967).

[28] *Id.* at 147.

[29] *Id.*

[30] Koppes, *supra* note 18, at 233.

[31] *Id.*

[32] *Id.*at 234.

[33] PINCHOT, *supra* note 18.

> tional success. There are other conditions, but this one lies at the foundation.[34]

Although others support the conservation of natural resources in terms of esthetics,[35] environmental scholars consistently perceive conservation in economic terms.[36] The importance of natural resources to a jurisdiction's economy is critical. Indeed, competition over access to natural resources may lead to the dangers of hostilities that Hamilton recognized in *Federalist No. 6*.[37] As one scholar noted:

> The trouble spots of the world, in which warfare goes on or in which the threat of war exists, are most commonly the resource-deficient areas, or those areas lacking the technology to make use of available resources . . . . As world populations continue to grow and as natural resources dwindle, the danger of war also grows.[38]

Given this perspective, it is logical to relate the access to natural resources to competition between the "haves" and the "have-nots." Both commercial competition and competition for natural resources share the same underlying dangers—potential hostilities. In this sense, the underlying purpose of the dormant Commerce Clause—to prevent potential hostilities—equally applies to both economic protectionism and protection of natural resources.

B. Public Health, the Police Power, and State Sovereignty

If natural resources are inextricably related to economics, then the dormant Commerce Clause pertains to a state's efforts to protect its resources. When a state's efforts to protect its natural resources results in an interference with interstate commerce, the underlying rationale and goals of the dormant Commerce Clause would direct a court to consider the state's action within the context of the national economy. On the other hand, the implication of the dormant Com-

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[34] *Id.* at 4.

[35] *See* Koppes, *supra* note 18, at 233. For an interesting example of the debate between preservation and conservation, see the discussion of the Hetch Hetchy issue in NASH, *supra* note 27, at 161-81.

[36] *See, e.g.*, DRIESEN, *supra* note 18, at 5 (discussing the relationship between a growing economy and the earth's carrying capacity); FRANK E. SMITH, THE POLITICS OF CONSERVATION x (1966) (recognizing that the "[e]mphasis in conservation problems shifts with the changing economy and the changing environment").

[37] *See infra* notes 52-55 and accompanying text.

[38] RAYMOND F. DASMANN, ENVIRONMENTAL CONSERVATION 1-2 (2d ed. 1968). *Cf.* ROBERT LEO SMITH & THOMAS M. SMITH, ELEMENTS OF ECOLOGY 166 (4th ed. 1998) (discussing various forms of intra-species competition when resources are limited).

merce Clause is that a state may regulate areas "unrelated to economic protectionism."[39] This undoubtedly includes those areas traditionally under a state's police power.

The Supreme Court has recognized that the protection of public health is a fundamental component of the police power. "It is elemental that a state has broad power to establish and enforce standards of conduct . . . relative to the health of everyone there. It is a vital part of a state's police power."[40] The protection of public health also is an integral part of environmental regulation. As the Supreme Court stated in *Huron Portland Cement Co. v. City of Detroit*,[41] "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."[42] The Indiana Supreme Court has gone further and recognized the protection of public health as a fundamental justification for a state's authority to govern.[43] That "the preservation of the public health is one of the *duties devolving upon the state*, as a sovereign power, cannot be successfully controverted."[44] One justification for the state's authority to regulate for the public health rests on a state's *moral duty* to protect the health, safety and welfare of its citizenry.[45]

A state's protection of the public health pertains to more than simple economic concerns. Those non-economic concerns are related to a particularly important and relevant topic under dormant Commerce Clause jurisprudence—state sovereignty. It has previously been argued that the dormant Commerce Clause does not govern the regulation of prescription drugs because prescription drugs relate to the public health, which is "a traditional area of state responsibility."[46] Most importantly, the Supreme Court has upheld state regulations designed to prevent the "spread [of] disease, pestilence, and death" under the dormant Commerce Clause.[47] In this sense, health and safety are more central to the exercise of the police power than economic welfare, although all three pertain to the police power. Therefore, the

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[39] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

[40] Barksy v. Bd. of Regents, 347 U.S. 442, 449 (1954).

[41] 362 U.S. 440 (1960).

[42] *Id.* at 442.

[43] Blue v. Beach, 56 N.E. 89 (Ind. 1900).

[44] *Id.* at 92 (emphasis added).

[45] *Cf.* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971) (discussing how poverty programs are not just a means of social control but a moral duty of government).

[46] Abigail B. Pancoast, Comment, *A Test Case for Re-Evaluation of the Dormant Commerce Clause: The Maine Rx Program*, 4 U. PA. J. CONST. L. 184, 201 (2001).

[47] Bowman v. Chi. & N.W. Ry. Co., 125 U.S. 465, 489 (1888).

former are entitled to greater weight in balancing state sovereignty with federal economic concerns.

II. ENVIRONMENTAL PROTECTION UNDER THE DORMANT COMMERCE CLAUSE

A. Background

1. Fundamental Principles of the Dormant Commerce Clause

"The Congress shall have Power . . . To regulate Commerce . . . among the several States."[48] The Commerce Clause has long been held to provide Congress the authority to regulate interstate commerce.[49] Moreover, the Supreme Court has consistently interpreted the Commerce Clause to provide a degree of limitation on a state's ability to regulate interstate commerce.[50] For the purpose of this Note, it is important to understand both the Commerce Clause and its dormant counterpart as a balance between the prevention of economic protectionism, on the one hand, and the promotion of a state's sovereignty manifested through the exercise of its police power, on the other.

The principle underlying the Commerce Clause and, hence, the dormant Commerce Clause, was the prevention of balkanization among the states. One of the primary sources of balkanization, the Framers thought, was commercial competition among the states.[51] Indeed, Federalist No. 6, which addressed "Dangers From War Between the States,"[52] noted that past wars between nations "have in a great measure grown out of commercial considerations."[53] Moreover, because the Framers thought that those "[commercial] situations have borne the nearest resemblance to our own," the ingredients for commercial hostility among the states were continually present.[54] As the topic and content of Federalist No. 6 suggest, unchecked commercial competition among the states could lead to hostilities and, perhaps, war. As a solution, Hamilton urged the creation of a stronger union.

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[48] U.S. CONST. art. I, § 8, cl. 3.

[49] *See generally* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Wickard v. Filburn, 317 U.S. 111 (1942); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

[50] *See, e.g.*, Or. Waste Sys., Inc. v. Or. Dep't of Envtl. Quality, 511 U.S. 93 (1994); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1852).

[51] THE FEDERALIST NO. 7 (Alexander Hamilton).

[52] THE FEDERALIST NO. 6, at xv (Alexander Hamilton) (J.M. Dent & Sons 1970).

[53] THE FEDERALIST NO. 6, at 24 (Alexander Hamilton) (J.M. Dent & Sons 1970).

[54] *Id.*

"The genius of republics . . . . is pacific; the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humours which have so often kindled into wars."[55] According to the Framers, a centralized government was critical in fostering commercial unity.[56]

While the theme of balkanization pervaded the Framers' arguments for a centralized government, the Framers also recognized some flexibility in a state's authority to regulate commerce. In discussing the "competitions of commerce," Hamilton emphasized that "[*w*]*e should be ready to denominate injuries those things which were in reality the justifiable act of independent sovereignties consulting a distinct interest.*"[57] While Hamilton suggested that the Constitution should work to prevent a sovereign from certain actions taken in the interest of its citizens, his statement also suggested a level of degree in preventing such actions. In other words, denominating injuries should be a question of degree and not a categorical rule. Accordingly, the Constitution should recognize certain interests that would justify a state's regulating commerce when a state is acting consistently with its powers as a sovereign.

2. *Common Theme in Modern Dormant Commerce Clause Jurisprudence: Balancing the Federalist Interest in a National Economy against Legitimate State Interests*

The extent of a state's sovereignty within our federalist structure is a function of how the Court interprets the extent of a state's police power.[58] As mentioned, one constitutional source controlling the extent of a state's authority is found in the dormant Commerce Clause. In analyzing an alleged violation of the dormant Commerce Clause, the Court has developed two tests: the "*per se* invalid" test[59] and the *Pike*[60] balancing test.[61]

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[55] *Id.* at 22.

[56] *Id.*

[57] THE FEDERALIST NO. 8, at 28 (Alexander Hamilton) (J.M. Dent & Sons 1970).

[58] *See e.g.*, Sporhase v. Nebraska, 458 U.S. 941, 954 (1982) (discussing extent of state's proprietary interest in regulation of water use with dormant Commerce Clause context).

[59] City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[60] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The Supreme Court articulated the balancing test as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (citation omitted). If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a

Which test a court will employ depends upon the nature of a state's interference with interstate commerce. The *Pike* balancing test applies to even-handed regulations, while a court will employ the "*per se* invalid" test when a state "overtly blocks the flow of interstate commerce at [its] borders."[62] The "*per* se invalid" test places the burden on the state to demonstrate that its interest is sufficiently legitimate to justify incidental burden on interstate commerce.[63] In establishing this test, the Supreme Court recognized the underlying goal of maintaining a national economy:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.[64]

When a court employs the "*per se* invalid" test, it will invalidate a state regulation of interstate commerce unless the state can point to a legitimate local interest promoted by the regulation and the absence of other, non-discriminatory means. Because the Supreme Court developed the "*per se* invalid" test from the language of the *Pike* balancing test,[65] the Court purported to take the putative local interest into consideration. Indeed, the majority in *Philadelphia* purported to include a consideration of the legitimate local interest as part of its "crucial inquiry."[66]

Although the Court has developed two tests to analyze dormant Commerce Clause issues, the underlying state interest in the regulation lies at the heart of both rules. The focus then becomes a question of whether that interest is constitutionally sufficient to justify interference with interstate commerce. With respect to the legitimate local interest, the Court has created a balancing test in which the legitimate

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lesser impact on interstate activities.

Id. at 142.

[61] The focus of this Note is the "*per se* invalid" test; however, discussion of one test may well shed light on the other. This is particularly true because the subject of this Note pertains to a component that each test shares: the state's putative local interests in regulating commerce.

[62] *Philadelphia*, 437 U.S. at 624.

[63] *Id.*

[64] *Id.* at 623-24.

[65] *Id.* at 624.

[66] *Id.*

state interest is weighed against the degree of interference that the state law or program effects.[67] Under this perspective, the "*per se* invalid" test and the *Pike* balancing test both consider the state's legitimate interest. The only difference between the two is the level of judicial scrutiny. The "*per se* invalid" test and the *Pike* balancing test become "'strict' protectionist effect balancing" and "'weak' protectionist effect balancing," respectively.[68] Nevertheless, the local benefits or interests are invariably part of a court's equation.[69]

Given the balancing nature of the two dormant Commerce Clause approaches, it is understandable why a state would cite environmental protection as the underlying purpose of its regulation: It behooves a litigant to create a laundry list of reasons supporting its stance. The more reasons cited, the more apparent weight of the justification. Environmental protection provides a tactical benefit because environmental issues often entail a plethora of concerns.[70] Under the balancing tests, the sheer number of interests that support the state's position may tip the scale in its favor.

The balancing nature of the dormant Commerce Clause tests, however, requires a court to consider the relevancy and sufficiency of the underlying interests. For example, a court scrutinizes the nature of the underlying state interests involved. Those interests that entail a form of narrow protectionism should not be included on the scale that balances the state and federal interests. Just because one or more of the underlying interests entail protectionism, however, does not mean that a court should discount those that are unrelated to economic protection. Instead, the concerns pertaining to the Constitution's federalist structure, which underlie the dormant Commerce Clause, demand that non-economic goals of the state's exercise of its police power must remain within the equation and not brushed aside as the Court has recently done.[71]

B. The "Per Se Invalid" Test and Environmental Protection

1. Recognition of Natural Resource Protection as a Form of Protectionism

It is important to understand how the Supreme Court has treated environmental regulations within the context of the dormant Com-

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[67] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1105-08 (1986).

[68] *Id.* at 1106.

[69] *Id.* at 1105.

[70] *See supra* text accompanying note 1.

[71] *See infra* Part II.B.

merce Clause. The Court's treatment reflects the underlying notion that resource protection pertains to economics and, hence, economic protectionism. The most recent opinions that have addressed state environmental regulations, however, pertained to both resource protection and public health and safety. These opinions have consistently relied on finding that the underlying purpose of the respective regulations sought to protect a state's natural resources, even though there were justifications on the grounds of public health and safety. In contrast, the dissents in these opinions have consistently argued that public health and safety concerns constitutionally validate the laws, while discounting the protectionist components of the regulations. The Court has rightly taken into consideration the protectionist nature of the regulations, but has ignored other important and compelling state interests. The dissenting opinions, on the other hand, have rightly addressed the underlying concerns of public health and safety, but incorrectly suggest that the protectionist nature of the regulations is irrelevant.

The Court has consistently recognized that resource protection is not a sufficiently legitimate state concern that would justify overt interference with interstate commerce.[72] Central to the Court's conclusion has been the awareness that resource protection would likely amount to the same balkanization about which the Framers were concerned. In *West v. Kansas Natural Gas Co.*,[73] the Court stated the oft-quoted proposition:

> In other words, the purpose of [natural gas's] conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals . . . . If one state has [such

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[72] *See, e.g.*, Sporhase v. Nebraska, 458 U.S. 941, 957-58 (1982) (recognizing that protection of ground water is a legitimate and important state interest, but concluding that reciprocity provision effectively prohibiting interstate transportation of ground water was violative of the dormant Commerce Clause); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 286-87 (1977) (striking down Virginia law that prohibited nonresidents from fishing in Chesapeake Bay); Pennsylvania v. West Virginia, 262 U.S. 553, 599-600 (1923) (concluding that state statute prohibiting interstate transportation of natural gas was unconstitutional); West v. Kan. Natural Gas Co., 221 U.S. 229, 262 (1911) (enjoining enforcement of state statute prohibiting interstate transportation of natural gas).

[73] 221 U.S. 229 (1911).

> power], all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."[74]

The Court concluded that the welfare of each state depends upon access to natural resources of other states. "[T]his was the purpose, as it is the result, of the interstate commerce clause."[75] The Court, nearly a century ago, recognized that a state's hoarding of its resources would not be tolerated because it went against the goal of a national economy.

2. City of Philadelphia v. New Jersey: *Development of the "Per Se Invalid" Test*

City of Philadelphia v. New Jersey[76] provided the framework for the current debate in the Supreme Court regarding environmental regulations under the dormant Commerce Clause. In that case, New Jersey enacted a statute that overtly banned the importation of most out-of-state solid waste,[77] reasoning that the rapid decrease in landfill space in the state would lead to environmental threats—through the improper disposal of waste—and that public health, safety, and welfare required a prohibition against importing waste generated outside the state.[78] The legislature authorized the New Jersey Department of Environmental Protection to establish a moratorium on the importation of most out-of-state waste until that agency could determine that importation could be "permitted without endangering the public health, safety and welfare" of New Jersey citizens.[79]

Soon after the legislation's enactment, operators of New Jersey landfills and surrounding out-of-state municipalities sued New Jersey and its Department of Environmental Protection, alleging that the statute only burdened interstate commerce. The New Jersey Supreme Court upheld the statute on the ground that the importation of out-of-state waste took "a heavy environmental toll, both from pollution and from loss of scarce open lands" and that the moratorium would extend the lifespan of existing disposal facilities, preventing virgin wetlands and other undeveloped lands from being used as landfills.[80] Moreover, the court ruled that solid waste in and of itself could be regulated because it was not an article of trade or commerce, but was an

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[74] *Id.* at 255.

[75] *Id.*

[76] 437 U.S. 617 (1978).

[77] *Id.* at 618-19 (noting that the New Jersey statute still allowed the importation of some waste that could be used for other purposes, such as feeding swine).

[78] *Id.* at 625.

[79] *Id.* at 618-19 (quoting N.J. STAT. ANN. § 13:1I-10 (West 1978)).

[80] *Id.* at 625.

item that could potentially expose the public to risk of disease.[81] The state validated the law because it, in part, "was designed to protect, not the State's economy, but its environment."[82]

On appeal to the United States Supreme Court, the petitioners argued that New Jersey had "outwardly cloaked" financial concerns "'in the currently fashionable garb of environmental protection.'"[83] They asserted that the moratorium was no more than an effort to stabilize disposal costs in the state of New Jersey by sustaining landfill space and delaying the day that New Jersey citizens would have to transport their solid waste out of state.[84]

Writing for the Court, Justice Stewart agreed with the petitioners, noting that a law that "overtly blocks the flow of interstate commerce at a State's borders" effects "simple economic protectionism."[85] Acknowledging that New Jersey had enacted a law that patently discriminated against interstate trade, Justice Stewart applied a *per se* invalidity test.[86] The basic inquiry left for the Court was whether the statute advanced legitimate local concerns or instead amounted to a protectionist measure.[87]

The Court concluded that the statute was a protectionist measure aimed at protecting New Jersey's dwindling landfill space. Justice Stewart ruled that the statute "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space."[88] Permitting this state action would undermine the goal of a national economy because the moratorium could result in retaliatory measures by neighboring states. "Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders."[89] In essence, the Court recognized that solid waste disposal was a national problem. Consequently, New Jersey was effectively isolating itself "from a problem common to many by erecting a barrier against the movement of interstate trade."[90]

With respect to New Jersey's concern about public health and safety, the Court recognized that the state had "every right" to protect

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[81] *Id.* at 622.
[82] *Id.*
[83] *Id.* at 625-26 (citations omitted).
[84] *Id.* at 626.
[85] *Id.* at 624.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 628.
[89] *Id.* at 629.
[90] *Id.* at 628.

"its residents' . . . environment."[91] The Court, however, circumvented a determination of the constitutional sufficiency of the state interest by ruling that "the evil of protectionism can reside in legislative means as well as legislative ends."[92] The "ultimate legislative purpose," therefore, "would not be relevant to the constitutional issue."[93] The remainder of the majority's opinion focused on the national scope of the solid waste problem and gave little attention to the state's interest in protecting the health of its citizens.[94]

Then-Justice Rehnquist's dissent in *Philadelphia* completed the framework of the current debate. He focused almost exclusively on the "currently unsolvable dilemma" created by the "health and safety hazards associated with landfills."[95] While void of compelling detail, his argument rested on the health and safety problems that arose from the *volume* of solid waste disposed of in New Jersey.[96] Justice Rehnquist stated that the Court had presented New Jersey with a Hobson's choice:

> New Jersey must either prohibit all landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, *thereby multiplying the health and safety problems* which would result if it dealt with such wastes generated within the State.[97]

Justice Rehnquist's conclusion was simple: health and safety concerns of this magnitude provided ample justification for a state to close its borders to out-of-state waste. The dissent never addressed the protectionist nature of the statute.[98]

In *Philadelphia*, the majority considered environmental protection to be a legitimate state interest, but nevertheless struck down the law because it found a component of protectionism underlying the statute. It circumvented the health and safety concerns, stating that the ultimate legislative ends are irrelevant because protectionist effects can lie in the *means* as well as the ends. This inconsistency – in ruling that ultimate legislative ends are irrelevant, but resting its decision on

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[91] *Id.* at 626.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 626-29.
[95] *Id.* at 630 (Rehnquist, J., dissenting).
[96] *Id.* at 631 (Rehnquist, J., dissenting).
[97] *Id.* (Rehnquist, J., dissenting) (emphasis altered).
[98] *Id.* at 629-33 (Rehnquist, J., dissenting).

an underlying protectionist intent—may arise from the Court's reluctance to address public health and safety, which are legislative ends traditionally and directly related to a fundamental component of a state's sovereignty.[99] Justice Rehnquist's dissent, however, focused on the public health and safety problems, concluding that they alone required upholding the statute. In essence, Rehnquist's dissent indicates that the Court's opinions are neglecting a critical portion of dormant Commerce Clause analysis: the fundamental notion that the dormant Commerce Clause should not be interpreted so as to excessively invade the province of state sovereignty.

3. Subsequent Cases

The basic framework outlined in *Philadelphia* continued in subsequent cases. For example, despite a recognition that a "State's interest in preserving its waters [is] well within its police power"[100] and that "water is indeed essential for human survival,"[101] Nebraska's reciprocity requirement that other states share water resources in order to receive water from Nebraska operated "as an explicit barrier to commerce between . . . States."[102] The conservation and preservation rationale was irrelevant to the outcome because of the "means-end relationship" espoused in *Philadelphia*.[103] Rehnquist, joined by Justice O'Connor, again dissented, noting that previous decisions by the Court had afforded states greater flexibility in regulating a natural resource that is "essential not only to the well-being but often to the very lives of its citizens."[104] Under Rehnquist's analysis, the essential quality of the resource gave a state a proprietary interest in that resource, and the Court should, consequently, afford states greater leeway in determining its use.[105]

In *Chemical Waste Management, Inc. v. Hunt*,[106] the Court struck down an Alabama statute that charged out-of-state imports of hazardous waste $72 per ton, while in-state shipments were charged only a base fee of $25.60 per ton.[107] Alabama argued, and the Alabama Su-

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[99] *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (stating that "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power").

[100] Sporhase v. Nebraska, 458 U.S. 941, 946 (1982).

[101] *Id.* at 953.

[102] *Id.* at 957.

[103] *Id.* at 958.

[104] *Id.* at 963 (Rehnquist, J., dissenting).

[105] *See id.* at 961-65 (Rehnquist, J., dissenting).

[106] 504 U.S. 334 (1992).

[107] *See id.* at 338-39.

preme Court agreed, that the discrepancy in the charges was based on a need to protect the health and safety of Alabama's citizens and conserve the state's natural resources.[108] Upon review by the United States Supreme Court, Alabama focused almost exclusively on the legitimate purpose "related to its citizens' health and safety."[109] The Court removed the relevancy of public health and safety, however, quoting *Philadelphia* at the beginning of its analysis and laying as its foundation the notion that protectionism can arise from discriminatory means as well as ends.[110] Under this rubric, the Court found that the additional charge was, in effect, Alabama's attempt to decrease the *volume* of waste entering certain hazardous waste facilities in Alabama.[111] This was effectively a means to conserve (i.e., protect) the disposal facilities' capacity to treat hazardous waste. Therefore, while the Court again said that the ultimate purpose of the statute does not matter in light of discriminatory means, its argument rested on the finding of a protectionist intent: to protect the facilities' treatment capacity at a cost to out-of-state actors.

Chief Justice Rehnquist was the sole dissenter, concluding that "the Court continues to err by its failure to recognize that waste—in this case admittedly *hazardous* waste—presents risks to the public health and environment that a State may legitimately wish to avoid[.]"[112] This time, however, Rehnquist went further than his previous opinions by treating the "preservation of the State's natural resources" as categorically sufficient to withstand constitutional scrutiny under the dormant Commerce Clause.[113] Chief Justice Rehnquist explicitly recognized environmental protection, through resource protection, as justified when the underlying interest was the health and safety of a state's citizenry.

Oregon Waste Systems, Inc. v. Oregon Department of Environmental Quality[114] seemed to be a response to Rehnquist's categorical authorization for states to protect their resources. The Supreme Court addressed an Oregon statute that charged the import of out-of-state waste at a higher rate than solid waste generated in the state.[115] Oregon reasoned that the additional charge treated out-of-state waste

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[108] *Id.* at 343.

[109] *Id.* at 342.

[110] *Id.* at 340.

[111] *See id.* at 346 ("[T]he additional fee [was] 'an obvious effort to saddle those outside the State' with most of the burden of slowing the flow of waste into the [hazardous waste disposal] facility.") (citation omitted).

[112] *Id.* at 350 (Rehnquist, C. J., dissenting).

[113] *Id.* at 349 (Rehnquist, C. J., dissenting).

[114] 511 U.S. 93 (1994).

[115] *Id.* at 96.

equally with in-state waste, since out-of-state generators were not required to pay state disposal taxes.[116] The state asserted that the additional charge of $1.40 per ton reflected this difference.[117] In striking down the law, the Court rejected Oregon's argument that "if Oregon is engaged in any form of protectionism, it is 'resource protectionism,' not economic protectionism."[118] The Court reiterated its previous rule that "'a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.'"[119] As in *Philadelphia*, the "natural resource" at bar was landfill space and, regardless of the health and safety concerns espoused by the state, "'[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.'"[120] The Court effectively concluded that "resource protectionism"[121] will never be valid under the dormant Commerce Clause.

Chief Justice Rehnquist once again dissented, noting that "the Court stubbornly refuses to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as these[.]"[122] Rehnquist claimed that the shortage of landfill space in the country was reaching a crisis level and that "'a State may favor its own citizens in times of shortage.'"[123] As in previous cases, Rehnquist saw the shortage of landfill space as leading to the improper disposal of solid waste and, consequently, creating health and safety hazards. According to Rehnquist, because the Court has recognized a "distinction between economic protectionism and health and safety regulation promulgated by [a state],"[124] the Court should afford states the requisite flexibility to protect its citizens.[125]

4. The No-Alternatives Exception: Maine v. Taylor

Even if a state enacts what amounts to a protectionist measure, the Supreme Court will uphold that law when the state has no nondiscriminatory means of protecting its natural resources. Indeed, *Maine*

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[116] *Id.* at 105-06.

[117] *Id.*

[118] *Id.* at 107.

[119] *Id.* (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).

[120] *Id.* (quoting Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 339-40 (1992)).

[121] *Id.* at 107.

[122] *Id.* at 110 (Rehnquist, C. J., dissenting).

[123] *Id.* at 111 (Rehnquist, C. J., dissenting) (quoting Sporhase v. Nebraska, 458 U.S. 941, 957 (1982)).

[124] *Id.* (Rehnquist, C. J., dissenting).

[125] *Id.* at 108-11 (Rehnquist, C. J., dissenting).

v. Taylor,[126] which presented this situation, is the only recent dormant Commerce Clause case in which the Court has upheld a state environmental statute that explicitly banned interstate commerce. The case involved criminal charges against Taylor for the importation of 158,000 golden shiners, a type of baitfish.[127] Five years earlier, the Maine legislature had enacted a statute that prohibited the importation of certain baitfish, including golden shiners.[128] The purpose of the amendments was to protect "Maine's unique and fragile fisheries," since golden shiners from out-of-state carry parasites that both did not exist in Maine and would threaten Maine's salmon population.[129]

On appeal, Maine argued that in addition to the singularity of its fish population, there were no reasonable alternatives to inspecting shipments of baitfish at its borders. Because of the commingling of different species within large shipments of baitfish, it made inspections physically impossible.[130] Additionally, while statistical analyses were available for inspecting larger fish (e.g., salmon and trout), none was available for inspecting smaller baitfish. In essence, Maine argued that it had no alternative but to ban the importation of certain baitfish until it could employ adequate inspection tests.

Justice Blackmun, writing for the majority, agreed with Maine. He noted that "the 'abstract possibility,' of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an '[a]vailabl[e] . . . nondiscriminatory alternative[s] . . . .'"[131] Moreover, he noted that the development of such procedures "could be expected to take a significant amount of time."[132] Given the delicate nature of Maine fisheries, banning the importation of out-of-state baitfish was the only reasonable alternative to protect them. He concluded that Maine's baitfish ban "serve[d] legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives."[133]

The decision in *Taylor* came down to the absence of nondiscriminatory means to protect its resources. While the Court ruled that Maine's purported interest in protecting its fisheries showed no signs

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[126] 477 U.S. 131 (1986).

[127] *Id.* at 132. Interestingly, while the federal government initially brought the charges against Taylor in *United States v. Taylor*, 585 F. Supp. 393 (D. Me. 1984), it joined Taylor in arguing the unconstitutionality of the state statute at the Supreme Court.

[128] Taylor, 477 U.S. at 132 (citing ME. REV. STAT. ANN., tit. 12, § 7613 (West 1981)).

[129] *Id.* at 141. Two prosecution witnesses argued, respectively, that Maine possessed particularly clean water, supporting a delicate population of fish, and that only Maine has a representative population of landlocked salmon. *Id.* at 141, n.8.

[130] *Id.* at 141.

[131] *Id.* at 147 (citations omitted).

[132] *Id.*

[133] *Id.* at 151.

of "protectionist intent," ample evidence suggested otherwise. For example, the Court downplayed a state agency statement that questioned "why we should spend our money in Arkansas when it is far better spent at home" and reasoned that an in-state baitfish industry "could develop a lucrative export market in neighboring states."[134] Moreover, "golden shiners [were] already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry)."[135]

5. Summary of the Basic Framework

As the "*per se* invalid" test has evolved, the Supreme Court has created a rule that purports to balance state interests with the goal of preventing balkanization. However, with the additional component—that protectionism lies in both the ends and the means of state action—the Court stops short of the purported structure of its test. By recognizing that protectionism lies in the means of state action, the Court has effectively removed any consideration of the state's goals; the "ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue."[136] In essence, the Court is saying that the presence of *any* protectionism negates *any* interest that the state may present on its side of the dormant Commerce Clause scale. Rehnquist, on the other hand, has consistently argued that public health and safety is an important enough interest to justify any of the state regulations, whether they outwardly ban interstate commerce or treat out-of-state actors differently. In this sense, Rehnquist and the Court are moving parallel to one another, but in opposite directions.

Additionally, the Court in *Maine v. Taylor* recognized an exception to the "*per se* invalid" test when the state has no nondiscriminatory means to protect its interest. This exception appears to be strong enough to withstand evidence of a protectionist measure.

III. RETAINING THE FRAMERS' INTENT ON NOT INVADING THE PROVINCE OF STATE SOVEREIGNTY: THE EXAMPLE OF ACID RAIN

The issue of acid rain provides an example of when the Court's "protectionist means" standard raises questions regarding the extent to which the Court is recognizing interests related to a state's police power. Acid rain is caused, in part, by the release of sulfur dioxide

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[134] *Id.* at 149 (citation omitted).
[135] *Id.* at 152 (Stevens, J., dissenting).
[136] City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

and nitrogen oxides into the atmosphere.[137] While aloft, sulfur dioxide and nitrogen oxides form sulfuric and nitric acid,[138] and, as rain falls through the atmosphere, the rain absorbs these acidic aerosols.[139] The greater the concentration of acidic compounds in rain, the lower its pH.[140] While neutral rainwater has a pH of approximately 5.0, rainwater in industrial areas of North America are typically around 4.0.[141] The impacts of acid rain, thus, are predictable and numerous. Acid rain can lead to deterioration of man-made structures, fish kills, decline in forest growth, and negative impacts to soil and human health.[142]

The term "acid rain," however, is misleading. Acid *rain* is only one component of acid *deposition*.[143] Acid deposition pertains to both the deposit of "dry" and "wet" constituents from the atmosphere.[144] This is particularly important with respect to the health effects of sulfur dioxide and nitrogen oxide emissions. "Wet" deposition does not directly affect humans.[145] However, because both sulfuric and nitric acid are water soluble in their "dry," aerosol form (the reason they can readily combine with rain droplets), they are easily absorbed into the nose and respiratory tract of humans when inhaled.[146] Exposure to these acidic aerosols over a long period of time "is known to damage lung tissue and contribute to the development of respiratory diseases such as asthma and chronic bronchitis."[147] The constituents of acid rain also are connected to premature deaths in the United States. A recent study estimated that, in 2007, approximately 6,000 people will die prematurely from sulfur dioxide and nitrogen oxide pollution.[148] In addition, those pollutants will cause approximately "4,300 annual cases of chronic bronchitis, 160,000 cases of upper respiratory symptoms and 140,000 asthma attacks."[149] Because the study pro-

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[137] FIRESTONE & REED, *supra* note 1, at 81. Sulfur dioxide and nitrogen oxides are emitted from natural sources as well. However, the primary sources of these pollutants in the United States are man-made. *Cf.* PETER V. HOBBS, INTRODUCTION TO ATMOSPHERIC CHEMISTRY 134 (2000) (labeling air over northeast United States as "heavily polluted").

[138] FIRESTONE & REED, *supra* note 1, at 81.

[139] HOWELLS, *supra* note 5, at 5-6.

[140] *Id.* at 6.

[141] *Id.* at 6.

[142] FIRESTONE & REED, *supra* note 1, at 81.

[143] HOWELLS, *supra* note 5, at 5.

[144] *Id.* at 5.

[145] *Id.* at 8.

[146] I DON'T CARE ABOUT THE AIR!, *Health Effects of Pollution, at* http://www.idon'tcareabouttheair.com/facts/health.html (last visited Feb. 20, 2004).

[147] Wisconsin Department of Natural Resources, *Acid Rain in Wisconsin*, at http://www.dnr.state.wi.us/org/aw/air/HEALTH/acidrain.htm (last visited Sept. 2, 2004).

[148] Pianin & Morgan, *supra* note 3.

[149] *Id.*

jected that the air would be cleaner in 2007, when additional air pollution reductions are set to take effect, these numbers are lower than current estimates.[150]

The study also estimated that, in the state of New York, 340 people would die prematurely from sulfur dioxide and nitrogen oxide pollution in 2007.[151] Importantly, most of this pollution comes from outside of New York.[152] The influx of pollution into the Northeast from out-of-state sources is known as an environmental externality, which, as previously noted, can be characterized as a problem of costs and benefits: "a state that sends pollution to another state obtains the labor and fiscal benefits of the economic activity that generates the pollution but does not suffer the full costs of the activity."[153] Moreover, two mechanisms within the federal Clean Air Act are thought to promote the presence of air pollution externalities.[154] First, the Act does not adequately limit the height of smoke stacks. The stack height determines the distance from the stack that pollution is felt. The higher the stack, the greater the distance a pollutant travels before it impacts human populations.[155] Second, a state can locate a polluting facility close to its downwind border. In this situation, air currents virtually ensure that air pollution will not reach the regulating state's population. As a result, the federal Clean Air Act has failed to prevent a means for states to externalize their pollution.[156] Because "the prevailing winds blow from west to east," the impacts of interstate air pollution in the eastern portion of the United States are "most serious."[157] Surprisingly, despite the severity of the problem in New York,[158] in-state polluting facilities were responsible for only 13–38% of the acid deposition within the state.[159]

Pursuant to its authority under the federal Clean Air Act,[160] New York sought to combat the problem of acid deposition by enacting a provision that would penalize New York firms that sold their air

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[150] Seelye, *supra* note 3.

[151] *Id.*

[152] Clean Air Mkts. Group v. Pataki, 194 F. Supp. 2d 147, 151 (N.D.N.Y. 2002).

[153] Revesz, *supra* note 23, at 2343. I present this same description in the Introduction, *infra*.

[154] *Id.* at 2350-54.

[155] *Id.* at 2351.

[156] *Id.*

[157] *Id.*

[158] Raymond Hernandez, *Pataki Signs Two Measures Aimed at Cutting Back Pollution*, N.Y. TIMES, May 25, 2000, at B1.

[159] Clean Air Mkts. Group v. Pataki, 194 F. Supp. 2d 147, 161 (N.D.N.Y. 2002).

[160] The Clean Air Act operates by delegating the authority to regulate air pollution sources to the states through the creation of respective State Implementation Plans. 42 U.S.C. § 7410 (2000).

emissions credits to power plants in the Midwest and South.[161] New York would assess a penalty against New York firms that: 1) transferred sulfur dioxide credits directly to firms in upwind states; or 2) transferred sulfur dioxide credits to a non-upwind state without including a "restrictive covenant" that prohibited the credits' eventual transfer and use in an upwind state.[162] Although credits originating from New York only amounted to approximately 3% of the credits available to facilities in upwind states,[163] environmental groups applauded Governor Pataki when he signed the measure into law.[164]

The effect of the New York statute was twofold. First, it required that a New York firm transferring credits to an upwind state forfeit its proceeds from that sale to New York's Public Service Commission.[165] Second, the penalty system impacted the price of New York emissions credits in the interstate market. After New York implemented its plan, credits originating from New York were 2.5 - 5% less valuable than credits in other states.[166]

The Clean Air Markets Group ("CAMG"), among others, challenged the validity of New York's penalty system under the Commerce Clause and the Supremacy Clause.[167] With respect to the Commerce Clause, CAMG argued that the emissions credits constituted a commodity and that New York's penalty system amounted to a "protectionist statute" because it created a barrier to the interstate trade of emissions credits.[168] In response, New York asserted that the system could not constitute a protectionist statute because the penalty was directed at in-state firms, and that the change in the price of New York credits was merely incidental.[169] Alternatively, it argued that

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[161] Hernandez, *supra* note 158. Air emissions credits dictate how much pollution a facility may emit. They are meant to create an incentive to reduce pollution through a market-based system by allowing firms to sell excess credits in the marketplace. Theoretically, if a firm estimates that a portion of its credits would sell at a higher price than the cost of implementing pollution control measures, then it will implement those measures and sell the credits to a facility or firm willing to pay for them. FRANK P. GARD, TREATISE ON ENVIRONMENTAL LAW 2-340 (2003).

[162] *Clean Air Mkts. Group*, 194 F. Supp. 2d at 154. According to the stipulated facts in that case, "upwind states" included New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, Tennessee, West Virginia, Ohio, Michigan, Illinois, Kentucky, Indiana, and Wisconsin. *Id.* at 152.

[163] *Id.* at 162.

[164] Hernandez, *supra* note 158.

[165] *Id.* The forfeited proceeds would help fund the development and use of nonpolluting sources of energy. *Id.*

[166] *Clean Air Mkts. Group*, 194 F. Supp. 2d at 154.

[167] *Id.*at 150.

[168] *Id.* at 159.

[169] *Id.*

the statute was not protectionist because the legislature enacted it to protect natural resources.[170]

The district court agreed with the plaintiffs and held that New York's penalty scheme violated the dormant Commerce Clause because it amounted to a protectionist measure.[171] It defined a protectionist statute as one that results when "a state isolat[es] itself from a common problem by restricting the movement of articles of commerce in interstate commerce."[172] New York could not address the common problem of acid deposition by interfering with interstate commerce. The court found that the penalty effectively banned the transfer of credits to upwind states.[173] It also disregarded New York's assertion that the statute furthered the state interest of environmental protection. "Even if laudable," the legitimate local interest in protecting the environment was irrelevant to the analysis.[174]

The statute in *Clean Air Markets Group* should have been upheld for two reasons. First, acid deposition is a problem largely because of the health effects related to it.[175] Acid deposition can exacerbate asthma and bronchitis, cause acute bronchitis, and lead to premature death.[176] New York alone should expect 340 premature deaths from acid deposition in 2007, a reduction from current estimates.[177] Clearly, there are specific health effects related to acid deposition that qualify it as a public health issue. Second, no nondiscriminatory alternative could have provided an effective means to abate the impact of acid deposition. Acid deposition is a problem virtually exclusive to the Northeast[178] and is caused by an environmental externality.[179] Given the regionalism that acid deposition invokes, New York—partnered with other Northeast states—could not compel members of Congress from upwind states to cut back their utility production.[180] Alternatively, an even-handed regulation would not have effectively reduced the amount of sulfur dioxide or nitrogen oxide entering New York from out of state. Emissions of those two pollutants originating

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[170] *Id.* at 161.

[171] *Id.* at 160-61.

[172] *Id.* at 161.

[173] *Id.* The court noted that with a 100% penalty on transfers that did or may reach upwind states, "[i]t [was] not speculative to conclude that no New York unit would make such a transfer." *Id.* at 160.

[174] *Id.*

[175] *See* FIRESTONE & REED, *supra* note 1, at 81.

[176] *See supra* text accompanying notes 146-49.

[177] Pianin & Morgan, *supra* note 3.

[178] HOWELLS, *supra* note 5, at 114.

[179] *See supra* text accompanying notes 154-59.

[180] *See* Bernard C. Melewski, *Acid Rain and the Adirondacks: A Legislative History*, 66 ALB. L. REV. 171, 204 (2002) (concluding that Congress's recognition of acid rain as a state issue presents a bulwark in enacting federal protections of the Adirondacks).

from upwind states amounted to 62 – 87% of the sulfur dioxide in New York.[181] Additionally, New York's emissions credits amounted to only 3% of the total credits available to upwind states.[182] Thus, if New York had ended its emissions credits program altogether, so that no credits were available, the price increase for upwind facilities would have been nominal. Indeed, with the penalty system in force, the cost of credits rose only 2.5 – 5 percent.[183]

Clean Air Markets Group exemplifies the ambiguities presented by the "*per se* invalid" test when a court addresses an environmental regulation that entails a clear public health impact. While the district court correctly employed the test, the nature of the environmental issue at bar was significantly different from those in the solid and hazardous waste cases in which the Supreme Court developed its test. The solid and hazardous waste issues pertained to carrying capacities of the respective states, as the Court correctly noted.[184] Moreover, Rehnquist failed to point to a *specific* health effect from the improper disposal of solid and hazardous waste.[185] In *Clean Air Markets Group*, the district court correctly ruled that New York was interfering with interstate commerce when it found that the penalty scheme effectively banned the transfer of emissions credits. Nevertheless, the court's disregard for New York's interest in abating the impact of acid deposition was in direct reliance on *Philadelphia*'s "protectionist means" standard.[186] To be sure, New York did not help itself by relying on a natural-resources protection argument, especially in light of Justice Thomas's complete rejection of that argument in *Oregon Waste Systems*.[187] But the district court's obedience to the "*per se* invalid" test compelled it to overlook a key public-health concern. Upon a closer analysis of the dual purpose of environmental regulation and the underlying federalism argument of the dormant Commerce Clause, it is clear that the district court should have afforded New York greater authority in protecting its citizens.

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[181] Clean Air Mkts. Group v. Pataki, 194 F. Supp. 2d 147, 161 (N.D.N.Y. 2002).

[182] *Id.* at 162.

[183] *Id.* at 154.

[184] *See supra* Part II.

[185] *Id.*

[186] *Clean Air Mkts. Group*, 194 F. Supp. 2d at 160 ("A statute can be protectionist by virtue of not only the legislative ends, but also the legislative means. Thus, regardless of the ultimate legislative purpose, even if laudable, a statute that discriminates against commerce is protectionist and violates the Constitution." (citation omitted)).

[187] *See supra* text accompanying notes 114-25.

CONCLUSION

The dormant Commerce Clause is fundamentally an issue of federalism. As with other issues of federalism, the dormant Commerce Clause must weigh national interests against state interests to determine the most efficient and effective use of government. Specifically, a state's interest in the extent of its police power, and thereby the extent of its sovereignty, must be judged against the interests in and benefits of a national economy. Both interests have vied for supremacy since before the Constitution. Among the Framers' goals was the creation of a centralized government that would retain state sovereignty while preventing the dangers of balkanization. Textually, this is manifested in the Commerce Clause. Courts have extended the meaning of that provision to include a dormant, or negative, effect on state power. That is, the dormant Commerce Clause entails the same considerations of state sovereignty and balkanization as the Commerce Clause does. The dormant Commerce Clause provides a check against state sovereignty in light of the dangers of balkanization that might occur should states be allowed to regulate interstate commerce. Nevertheless, even the Framers recognized a limit on this check. Where the interests were intimately connected to the state's police power, courts would afford some leeway in their regulatory affairs.

If modern dormant Commerce Clause jurisprudence consists of a balancing test, then neither the Supreme Court's analysis nor that of Chief Justice Rehnquist is entirely correct. The Court's recognition of protectionism lying in the means as well as the ends of state legislation precludes an appropriate analysis of the putative local concerns regarding health and safety. Nevertheless, the Court has been correct in finding that resource protection would likely lead to competition and balkanization among the states. On the other hand, Rehnquist's categorical authorization for states to protect their resources when the public safety and health are involved ignores the balkanizing effect of resource protectionism. Both analyses contain important and useful aspects for analyzing state environmental regulations, but neither analysis is remotely complete. Instead, the opinions in their aggregate—that is, a combination of both the majority and minority opinions of each case—provide the best way to approach an environmental protection problem.

The Court should continue to recognize that resource protection is not sufficiently legitimate to justify discriminatory behavior. The majority has correctly deduced that resource protection creates the

same "evil of protectionism"[188] as other more directly economic forms of protection. The underlying rationale of resource conservation is to protect an area's economy.[189] Since Gifford Pinchot first began to lobby for the efficient use of resources,[190] economic well-being has explicitly been conservation's underlying rationale.[191] Access to natural resources may lead to conflict between the haves and have-nots.[192] Simultaneously, the Court has recognized that when a state limits access to natural resources to in-state persons, balkanization may likely result because "the purpose of . . . conservation is in a sense commercial - the business welfare of the [s]tate."[193] The Court in recent years has continued to recognize this attribute of resource protection when addressing issues labeled as "environmental."[194]

Nevertheless, the majority in recent opinions has effectively removed other interests related to environmental protection from consideration under the purported balancing scheme. By fashioning a perspective that is cognizant of protectionist *means*, as well as ends, the Court has precluded any appropriate analysis of the public health and safety concerns inherently involved with environmental issues. It has circumvented an analysis of these remaining interests by simply ruling that protectionist means make legitimate ends irrelevant.[195] Consideration of those underlying interests, however, is appropriate under the fundamental rationale of the dormant Commerce Clause. The dormant Commerce Clause fundamentally involves the goal of a national economy within the context of state sovereignty, since the power to regulate commerce to promote interests directly related to the police power is, at essence, an issue of the state's sovereignty with the federalist structure.[196] The Court unequivocally has acknowledged that the authority of a state to protect its citizenry's health and safety is intimately attached to that state's police power.[197] Undoubtedly, a state's interest directly related to its police power is a "valid factor unrelated to economic protectionism."[198] Indeed, the validity of interests intimately attached to a state's police power is sufficiently important and fundamental in the constitutional context so as not to

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[188] City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

[189] *See* Koppes, *supra* note 18, at 233; *see also* PINCHOT, *supra* note 18, at 4.

[190] PINCHOT, *supra* note 18, at 4.

[191] *See* Koppes, *supra* note 18, at 233.

[192] DASMANN, *supra.* note 38, at 1-2.

[193] West v. Kan. Natural Gas Co., 221 U.S. 229, 255 (1911).

[194] *See supra* Part III.

[195] Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 340 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

[196] Regan, *supra* note 67.

[197] *E.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960).

[198] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

be so easily disregarded. Nevertheless, under the majority's current "*per se* invalid" analysis, this "valid factor" effectively has no place in the equation.

Under the current "*per se* invalid" test, the Supreme Court's "protectionist means" component allows a court to conclude that a state action violates the dormant Commerce Clause solely on the ground that a protectionist scheme exists. When "environmental protection" is cited, however, the "protectionist means" component creates a test that is effectively incomplete. Because environmental protection often involves issues of both resource protection and public health and safety, the "protectionist means" component leads a court to neglect some of the state's interests related to the scrutinized regulation. This might be harmless if the state interests were related to other, strictly economic concerns. The issue of public health and safety, however, is not strictly related to economics. A state's interest in protecting the health and safety of its citizenry is at the core of its police power; further, the police power is a fundamental aspect of a state's sovereignty. Because the dormant Commerce Clause is, fundamentally, an issue of federalism, a state's sovereignty cannot be so easily cast aside. By retaining interests related to public health and safety in dormant Commerce Clause analyses, the jurisprudence would better reflect core issues underlying this constitutional provision. Otherwise, states lose meaningful participation in areas of life directly affecting their citizens.

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